No. 12412

In the United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICI CURIAE SUPPORTING NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

MASTERS & MASTERS,
703 Yeon Bldg., Portland, Oregon,
Attorneys for Petitioner.

IDA KLAUS, Solicitor,
Washington, D. C.,
of Attorneys for Respondent.

GREEN, LANDYE & RICHARDSON and BURL L. GREEN,
Corbett Building, Portland, Oregon,

J. W. BROWN,
Fountain Square Building, Cincinnati, Ohio,
Amici Curiae.

SUBJECT INDEX

INDEX TO CASES

WAGES AND HOUR ACT

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PETITION

Comes now Green, Landye and Richardson and Burl L. Green and J. W. Brown and represents to this Honorable Court that they are attorneys for Waitresses and Cafeteria Womens Local No. 305, Waiters Local No. 189, Bartenders, Card and Pool Room Workers Local No. 496, Cooks and Assistants Local No. 207, Hotel Service Employees Local No. 664, Local Joint Executive Board of the Hotel and Restaurant Employees and Bartenders International Union, formerly Hotel and Restaurant Employees International Alliance and Bar-

tenders International League of America, original parties in this proceeding before the National Labor Relations Board and petitions the Court for an order allowing the filing of brief herein amici curiae on the ground and for the reason that they have a direct interest in this litigation and that their interests will be affected by any decision herein.

GREEN, LANDYE AND RICHARDSON and
BURL L. GREEN,
J. W. BROWN,
Attorneys for Culinary Workers Alliance.

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In view of the fact that the Union known as the Culinary Workers Alliance each affiliated with Hotel and Restaurant Employees and Bartenders International Union, A.F.L. were the parties charged with an unfair labor practice in the original proceedings before the N.L.R.B. they have a direct interest in this litigation. Hence the authors of this brief as representatives of these Unions have felt it desirable and important that we ask leave to appear amici curiae.

STATEMENT OF FACTS

The record as revealed in the printed transcript on file herein and the appellant's statement contained in its brief is full and correct, therefore nothing need be added.

ANSWER TO APPELLANT'S FIRST ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

I.

Petitioner's operations were not in commerce nor did they affect commerce within the meaning of the act.

Consol. Edison Co. v. N.L.R.B., infra.

La Crosse Tele. Corp. v. Wisconsin Emp. Rel. Bd., infra.

Pittsburg Rys. Co., infra.

ARGUMENT

Appellant's brief on its first point is taken up entirely by its attempt to show that because of substantial purchases of out of state goods for the purpose of resale in its retail drug stores it was engaged in interstate commerce and affected commerce. On page 11 of appellant's brief appears the following statement:

"In the case before the Court, the Petitioner's operations in the State of Oregon separately considered

would be all intrastate in character but they have a direct relationship to its interstate activities."

We see, therefore, at the outset that the appellant admits that it was engaged in essentially a local enterprise. It is next contended that because a substantial percentage of its purchases originate from outside the state that any labor dispute would affect interstate commerce. We cannot deny this statement. It would indirectly affect commerce between the appellant and his out of state wholesale suppliers. In this modern age of rapid transportation and manufacture of goods in large factories situated throughout the U. S. there can be little doubt that no matter how large or small a retailer may be, yet he is engaged to some extent at least in a business affecting interstate commerce. It would be almost impossible to think of a business that does not sell or use some articles produced outside the state.

We admit it is not the amount that is controlling. Even though the interstate operation was small it might greatly affect commerce, whereas, on the other hand the interstate feature might be large and still have only an inconsequential affect on commerce. Herein lies the entire crux of the question.

Each of the cases cited by appellant to sustain its position that its business affected commerce has been closely examined. We do not differ with any of the decisions reached by the courts. In each of the cases cited the appellate courts merely affirmed the doctrine that outside of the de minimus rule, the amount of the interstate business is not important. In each of the cases the Board had assumed jurisdiction and found that the

particular business affected commerce. The appellate court affirmed the Board's ruling in each instance. None of the cases cited lend support to the appellant's position here; that is where the Board finds that the business does not affect commerce that the volume of out of state business controls the Board in its determination.

It is our contention the Congress meant a substantial affect on commerce and not every indirect or remote affect. The decisions of the courts directly support such a contention.

We quote:

> "Burdens and obstructions may be due to injurious actions springing from other sources. And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to Federal control is left to be determined as individual cases arrive. *Consol. Edison Co. v. N.L.R.B.,* 305 U.S. 197, 222."

The question in each case is whether the affect is close and substantial. It was said in *Scheckter Corp. v. U. S.,* 295 U.S. 495:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

Again it was said in *La Crosse Tele. Corp. v. Wisconsin Emp. Rel. Bd.,* 30 N.W. (2d) 241, 244, 251 Wis. 583, (reversed on other grounds 93 L. Ed. 265):

> "Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what has been defined as interstate commerce."

Where the employers themselves are not engaged in interstate commerce the question is whether their acts actually affect interstate commerce in any substantial manner and does not relate to the existence of the federal power but to the propriety of its exercise on a given state of facts. See *Pittsburg Rys. Co.*, 54 A. (2d) 891, 357 Pa. 379; *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 223-224.

It is therefore contended that the Board properly affirmed the trial examiner's ruling in allowing the motion of the employees to dismiss the complaint on the ground that the operation did not affect commerce. It is plain to be seen that this was one of the grounds on which the motion was granted (Rec. P. 17). The Board's action in affirming the trial examiner was on the entire record (Rec. P. 33).

The appellant contends next that if its operations were in commerce or affected commerce the Board was compelled to take jurisdiction. Outside of the question of the right of the Board to dismiss a complaint because it would not effectuate the policies of the act to exercise jurisdiction, which will hereafter be considered, we will admit the appellant is correct in this contention. As we have previously pointed out, though, it is not every enterprise which might indirectly affect commerce that compels the Board to assume jurisdiction. The appellant cited no authority under this contention which compels

a finding by the Board that an enterprise affects commerce even though the affect is indirect or inconsequential. This is the important question and must be decided on the particular facts in each instance. It is our contention that the Board in carrying out the purposes of the act is to be given wide latitude in making such a determination.

ANSWER TO APPELLANT'S SECOND ASSIGNMENT OF ERROR

POINTS AND AUTHORITIES

II.

The Board does have the power to refuse to exercise jurisdiction for the reason that it would not effectuate the policies of the act.

Section 10 (a) N.L.R. Act, 1947, 29 U.S.C.A. 160 (a).

Section 10 (c) N.L.R. Act, 1947, 29 U.S.C.A. 160 (c).

Section 3 (d) N.L.R. Act, 1947, 29 U.S.C.A. 153 (d).

Colgate-Palmolive Peet Co. v. N.L.R.B., 70 S. Ct. 166, 171.

La Crosse Tele. Corp. v. Wisc. Emp. Rel. Bd., supra.

Matter of Whiteway Pure Milk Co., 82 N.L.R.B. 1225.

Matter of Herold & Sons, Inc., 82 N.L.R.B. 174.

Matter of Guilford Dairy Coop. Assoc., Inc., 81 N.L.R.B. 1334.

Matter of Lewis Bros. Bakeries, Inc., 81 N.L.R.B. 1230.

Matter of Conlon Baking Co., 81 N.L.R.B. 934.

Matter of Detroit Canvas Manuf. Assoc., et al., 80 N.L.R.B. 267.

Matter of Golden Crust Baker, 80 N.L.R.B. 762.

N.L.R.B. v. Bell Oil and Gas Co., 98 F. (2d) 870.

N.L.R.B. v. Jones and Laughlin Steel Corp., 331 U.S. 416, 422-426.

N.L.R.B. v. Fred P. Weissman Co., 170 F. (2d) 952, 954-55.

ARGUMENT

In Section 10 (a) of the National Labor Relations Act, 1947, 29 U.S.C.A. 160 (a) (c), 153 (d), it is provided that:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice affecting commerce."

Section 10 (c) among other things provides:

". . . . and to take such affirmative action . . . . as will effectuate the policies of the act."

Section 3 (d) reads:

"The General Counsel of the Board . . . . shall have final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board. . . . ."

The appellant contends that in view of Section 3 (d) cited above the Board no longer has power to dismiss

a complaint solely on the ground that it would not effectuate the policies of the act to assume jurisdiction. We do not agree.

The purpose of the N.L.R.B. was and still is to promote and foster interstate commerce. Public rights have been vested in a public body charged in the public interest. Congress has seen fit to entrust to an expert agency the maintenance and promotion of industrial peace. The effectuation of this important policy has been left to the Board. The Board must look beyond its ruling in any one particular case as to the effect it may have throughout the country as a whole. No hard and fast rules can be laid down. In order to carry out the intent of Congress the Board must of necessity have wide latitude in its actions. The Board was not intended by Congress to act as a Court but as a quasi-judicial body. Its position as such a fact finding body is not unlike that of a grand jury in a criminal case. See *N.L.R.B. v. Bell Oil and Gas Co.*, 98 F. (2d) 870.

The Act itself specifically delegates to the Board the duty to carry out the purpose of the law. This included the power to dismiss a complaint for policy reasons (see Authorities Footnote 9, N.L.R.B. opinion, Rec. P. 28). The 1947 amendments did not take away from the Board this power and place them in the hands of the General Counsel. Section 3 (d) defining the powers of the General Counsel transferred the investigatory and prosecuting functions previously vested in the Board to the General Counsel. Certainly if Congress intended more it would have made its intention plain by appro-

priate language. Moreover repeal of legislative enactment by inference is not favored by the courts.

Moreover in addition to the cases cited by the Board in its opinion (Footnote 5, Rec. P. 26) the Board has almost continually since the 1947 Amendments continued to dismiss complaints on policy grounds. See following cases:

Matter of Whiteway Pure Milk Co., 82 N.L.R.B. 1225.

Matter of Herold & Sons, Inc., 82 N.L.R.B. 174.

Matter of Guilford Dairy Coop. Assoc., Inc., 81 N.L.R.B. 1334.

Matter of Lewis Bros. Bakeries, Inc., 81 N.L.R.B. 1230.

Matter of Conlon Baking Co., 81 N.L.R.B. 934.

Matter of Detroit Canvas Manuf. Assoc., et al., 80 N.L.R.B. 267.

Matter of Golden Crust Baker, 80 N.L.R.B. 762.

It is not deemed necessary to cite authority for the proposition that where over a long period of time an Administrative Agency has by its actions construed the meaning of legislative enactments without rebuff by the legislature or indeed, the courts, great weight is to be given that administrative construction.

Appellant has reviewed in detail the legislative history of the 1947 amendments. Suffice it to say that nowhere in that history is it indicated that the power of the Board to establish policy was to be taken away. The only intent was to withdraw the power of investigation and prosecution of cases from that of the Board. It was in effect a separation of powers.

The position of the Board has support in the later decisions since the 1947 amendments.

Colgate-Palmolive Peet Co. v. N.L.R.B., 70 S. Ct. 166, 171.

N.L.R.B. v. Jones and Laughlin Steel Corp., 331 U.S. 416, 422-426.

N.L.R.B. v. Fred P. Weissman Co., 170 F. (2d) 952, 954-55.

La Crosse Tele. Corp. v. Wisc. Emp. Rel. Bd., supra.

CONCLUSION

It is urged in conclusion that not only should this Court affirm the Board's action in holding that the appellant's operation did not affect commerce within the meaning of the Act but also that the Board does have the power in effectuating policy to refuse to assume jurisdiction.

Respectfully submitted,

GREEN, LANDYE AND RICHARDSON and
BURL L. GREEN,
J. W. BROWN,
Amici Curiae.